TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 180

GEORGIA HARDWOOD LUMBER COMPANY,
PETITIONER,

vs.

COMPANIA DE NAVEGACION TRANSMAR, S. A.,
OWNER OF SS. KOTOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 20, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF GEORGIA

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S/S KOTOR, Libelant,

versus

GEORGIA HARDWOOD LUMBER COMPANY, Respondent

In Admiralty No. 4

DOCKET ENTRIES

May 10, 1941. Original Libel.
May 10, 1941. Monition returnable May 30, 1941.
May 14, 1941. Marshal's return showing personal service on Robert B. Pamplin, Sec.-Treas., on May 12, 1941.
May 28, 1941. Order of Bascom S. Deaver extending time for filing answer until June 15, 1941.
June 13, 1941. Answer of Respondent.
July 3, 1941. Exceptions of Libelant to answer of Defendant.
June 24, 1942. Hearing before Judge A. B. Lovett.
Dec. 7, 1942. Copy of transcript of testimony taken June 24, 1942, at Augusta, Ga.
Dec. 7, 1942. Notice of Libelant to Respondent.
Dec. 7, 1942. Admission of Facts by Respondent.
Dec. 7, 1942. Opinion of Judge Lovett finding in favor of Respondent, libel to be dismissed.
Apr. 20, 1943. Findings of Fact and Conclusions of Law.

[fol. 2]

Apr. 20, 1943. Final decree, dismissing libel and taxing costs, $111.00, with interest from date until paid and directing that execution issue unless satisfied or stayed by appeal within ten days.
July 12, 1943. Notice of Appeal—copies mailed to Hull, Barrett, Willingham & Towill and Carpenter & Stevenson, as required by rule 73b.
July 21, 1943. $250.00 bond for costs on appeal.

Docket Entries Continued

July 21, 1943. Assignment of errors with acknowledgment of service by Hull, Barrett, Willingham & Towill.

Aug. 14, 1943. Petition for appeal.

Aug. 14, 1943. Stipulation as to Exhibits.

Aug. 14, 1943. Praecipe.

Aug. 17, 1943. Citation dated Aug. 16, 1943, signed by Judge Lovett, with Acknowledgment of Service to be forwarded with transcript to Clerk, Court of Appeals.

Aug. 30, 1943. Order dated August 30, 1943 allowing appeal nunc protunc as of July 12, 1943.

In United States District Court

Libel

To the Honorable Judges of the United States District Court for the District of Georgia:

The Libel and Complaint of Compania De Navegacion Transmar, S. A. owner of the S/S Kotar, against Georgia-Hardwood Lumber Company, in a cause of contract, civil and maritime, respectfully shows on information and belief:

First: That at all of the times herein mentioned, the libelant was and now is a corporation duly organized and existing under and by virtue of the Laws of the Republic of Panama, with its principal office and place of business at Panama City, and the owner of the S/S Kotar.

[fol. 3] Second: That at all of the times herein mentioned, the respondent was and still is a corporation duly organized and existing under the Laws of the State of Georgia, with an office and place of business at Augusta, Georgia.

Third: That on or about November 13, 1940, libelant entered into a contract in writing, signed by Cavalier Shipping Company, Inc., brokers for the account of Georgia Hardwood Lumber Company, and accepted by Georgia Hardwood Lumber Company to make a shipment from Jacksonville, Florida, to Alexandria, Egypt, by the Steamer Kotar, scheduled to load November 25, 1940.

Fourth: The shipment was to consist of seven hundred fifty thousand board feet of pine timbers not exceeding

four (4) pounds per thousand (1,000) board feet on and/or under deck, ship's option.

A copy of the said contract is hereto annexed and made a part hereof.

Fifth: That thereafter the S/S Kotar arrived at Jacksonville and loaded the timbers provided by the shipper. When said timber was put on board, it was found that the ship went down to her marks before it was loaded its full cargo by reason of the fact that the lumber shipped by the respondent exceeded the maximum weight stipulated in the contract.

Sixth: By reason of the respondent's cargo exceeding the weight (maximum 1,500 short tons) provided in the contract by 531,656 pounds, the vessel lost freights on a corresponding amount of tonnage.

Seventh: That the freights lost to the libelant through reason of respondent's cargo exceeding their contract max-
[fol. 4] imum, amounted to Nine-Thousand Three Hundred Four and 00/100 Dollars ($9,304), no part of which has been paid although duly demanded.

Eighth: The libelant has duly performed all and singular the obligations resting on it under the above mentioned freight contract of November 13, 1940.

Ninth: All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that citation in due form of Law may issue against the respondent therein, citing the respondent to appear and answer in the premises, and that a decree may be entered herein in favor of the libelant against the respondent for the amount of libelant's damages, together with interest and costs, and that the Court will grant to the libelant such other and further relief as the justice of the cause may require.

Dow, McAllister & Symmers, (Dow, McAllister & Symmers) Proctors for Libelant. Office & P. O. Address, 17 State Street, Borough of Manhattan, City of New York. Cumming, Harper & Nixon, Augusta, Georgia.

Duly sworn to by Wilbur E. Dow, Jr. Jurat omitted in printing.

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

[fol. 6] To the Honorable the Judge of the District Court of the United States for said District and Division:

Georgia Hardwood Lumber Company, a corporation organized and existing under the laws of the State of Georgia, with its principal office and place of business in the City of Augusta, Georgia, respondent herein to the libel of the above named libelant, makes this its answer to said libel and the several paragraphs thereof, and admits, denies and alleges as follows:

1. Respondent has no information or belief sufficient to enable it to answer the allegations of article one of the libel herein, and, therefore, calls for strict proof thereof, if relevant.

2. The allegations of the second article of said libel are admitted.

3. Respondent admits entering into a contract with libelant for the transportation of certain timber from Jacksonville, Florida, to Alexandria, Egypt, which contract was entered into on or about November 13, 1940, through Cavalier Shipping Company, Inc., brokers, who were at that time representing libelant in the operation of its steamer, Kotar, and that said contract was duly accepted by respondent and signed by libelant, and provided that shipment was to be made by the steamer, Kotar, scheduled to load said shipment on November 25, 1940. Except as specifically admitted, the third article of said libel is denied.

[fol. 7] 4. Respondent denies the allegations of the fourth article of said libel. Further answering said article, respondent admits that the contract referred to provided that the shipment was to consist of 750,000 board feet, of pine timber not exceeding 4 pounds per 1000 board feet on and/or under deck, ship's option, but respondent shows that the provision as to weight of 4 pounds per 1000 board feet was a typographical error, and the weight should have been 4 pounds per board foot or 4000 pounds per 1000 board feet. Further answering the fourth article of said libel, respond-

ent shows that the error so appearing in the contract covering said shipment is manifest on the face of said contract, and that at the time of signing said contract respondent called attention to said error and delivered said contract with a letter accompanying the same specifically providing that the weight referred to should be 4000 pounds per 1000 board feet, in correction of the manifest typographical error appearing in said contract. Further answering said article, respondent shows that said error was apparent on the face of the contract, was known to the libelant at the time the contract was accepted, and is now recognized in the libel which has been filed, through the statements contained in the sixth article thereof referring to the maximum weight as being 1500 short tons, which is the equivalent of 750,000 board feet of timber at 4000 pounds per 1000 board feet. Respondent denies that a copy of the contract is attached to the libel filed herein as Schedule A thereof, and excepts to said libel for the failure to so attach the same.

5. The fifth article of the libel filed herein is denied.

6. The sixth article of the libel filed herein is denied.

7. The seventh article of the libel filed herein is denied.

8. Respondent admits that libelant has transported timber shipped by it to Alexandria, Egypt, as set forth in the [fol. 8] eighth article of the libel filed herein, but respondent avers that said shipment was delayed and did not reach Alexandria, Egypt, until April 17, 1941, approximately four months after the date of sailing from Jacksonville, Florida. Further answering said article of the libel filed herein, respondent shows that it fully paid all carrying charges attributable to said shipment and that it has been injured and damaged by the libelant in connection with the handling of said shipment as hereinafter set forth.

9. Respondent denies the allegations of article nine of the libel filed herein, but admits that the alleged cause of action is within the admiralty and maritime jurisdiction of this Court.

10. Further answering, respondent alleges that at the time of entering into the freight contract referred to by libelant, it endeavored to secure a contract covering the transportation of 890,000 board feet of pine timber, but

was informed and advised by libelant, through Cavalier Shipping Company, Inc., its brokers, that the capacity of the ship had been contracted for the trip to Alexandria, Egypt, to the extent that 750,000 board feet of pine timber, weighing not exceeding 4000 pounds per 1000 board feet, would constitute the maximum amount of timber which could be transported for this respondent, and that the remaining 140,000 board feet which respondent desired to ship could not be carried because of lack of space and tonnage. Upon this basis, the original contract declared upon was entered into, with the weight referred to erroneously inserted as 4 pounds per 1000 board feet and not 4000 pounds per 1000 board feet as agreed upon between the parties, and with this error manifest upon a casual inspection of the contract, evidencing an impossible weight of pine timber, and the correction thereof now acquiesced in by the allegations of the libel filed herein. After the [fol. 9] steamer Kotor cleared from New York for Jacksonville, respondent was advised by the libelant, through Cavalier Shipping Company, Inc., that if the timber shipped by respondent did not weigh in excess of 4000 pounds per 1000 board feet, said steamship could carry approximately 50,000 board feet in addition to that covered by said contract, if respondent desired to avail itself of the opportunity of making said shipment. Upon this basis, respondent procured additional timber for shipment, and upon said steamer arriving at Jacksonville, respondent delivered to it for transportation to Alexandria, Egypt, 756,745 board feet of timber and an additional amount of 54,971 board feet, all of which was duly accepted by said steamship, and for which bill of lading was subsequently issued. Respondent specifically denies that the timber shipped by it under the original terms of the contract declared upon exceeded in weight 4000 pounds per 1000 board feet, and specifically denies that the steamship Kotor went down to its marks before it had loaded its full cargo, and, on the contrary, alleges that it did not go down to its marks until it had loaded the 750,000 board feet originally referred to in said contract, as well as 61,716 board feet in addition thereto, for all of which respondent paid the full freight charge provided in the contract declared upon and received bills of lading therefor, upon the basis provided of $70.00 per 1000 board feet.

Further and Separate Defenses

1. Further answering said libel and as further and separate defenses thereto, respondent alleges that said steamship Kotor was due to arrive in Jacksonville for loading on November 25, 1940, and that respondent accordingly shipped to Jacksonville the timber to be loaded, and arranged for the presence of its representatives, J. C. Wickliffe and E. C. Parker, in Jacksonville, for the purpose of checking and inspecting said timber as loaded, and secur- [fol. 10] ing the necessary bills of lading therefor. Respondent avers that said shipment of timber should have been loaded, by the exercise of ordinary diligence, within two days' time, that the steamship Kotor did not arrive at the pier for loading until late in the afternoon of November 26, 1940, at which time it loaded two timbers, solely for the purpose of technically recording the beginning of loading on that date. The real loading was not begun until the morning of November 27, 1940, with no effort made to expedite the work of loading and with said work delayed so that it was not completed until the afternoon of December 4, 1940, or a total time consumed of eight days in loading said timber, which should have been loaded within forty-eight hours, by the exercise of ordinary diligence. This delay resulted in respondent being forced to pay for the additional time required of its representatives and their expenses in Jacksonville for a period of six days. Respondent alleges that the extra time required of its said representatives required the payment by it of $200.00 to J. C. Wickliffe and $50.00 to E. C. Parker, together with the payment of $50.00 for the expenses of said two representatives during said period of time in Jacksonville.

2. Respondent further alleges that upon the completion of the loading of said ship, the Master thereof refused to issue a bill of lading for the goods so received, unless and until he was paid freight in excess of the amount properly chargeable thereon, at first demanding the payment of an excess amount of $9,300.00, and later reducing said demand to $6,000.00, with the result that respondent, in an effort to secure the bill of lading to which it was entitled upon the payment of the proper charges on said shipment of $70.00 per 1000 board feet, was forced to employ the firm of Ragland, Kurz & Layton, attorneys at law of Jacksonville, Florida, and through them to make further demands for

said bill of lading, which was ultimately delivered upon the demand of said attorneys. Respondent alleges that [fol. 11] said attorneys charged $100.00 for their services in connection with securing said bill of lading, that said charge was reasonable for the services involved, and that it has been forced to expend said amount by reason of the arbitrary action of the Master of the steamship Kotor in declining to deliver said bill of lading.

3. Respondent alleges that as a result of the acts above set forth it has been injured and damaged in connection with said shipment in the gross sum of $400.00, which it is entitled to recover from said libelant by way of recoupment in the present action.

Wherefore, respondent prays that the said libel and complaint be disinissed with costs, and that it do have and recover a decree against the libelant for its damages sustained as herein set forth.

Georgia Hardwood Lumber Company, by O. R. Cheatham, President. Hull, Barrett, Willingham & Towill, Proctors for Respondent.

Duly sworn to by O. R. Cheatham. Jurat omitted in printing.

[fols. 12-18] STATE OF GEORGIA,
Richmond County:

Due and legal service of the within answer, together with a copy thereof, is hereby acknowledged. All other and further service and notice is hereby waived.

This 12th day of June, 1941.

Dow, McAllister & Symmers, Cumming, Harper & Nixon, Proctors for Libelant.

[fol. 19] IN UNITED STATES DISTRICT COURT

OPINION

ARCHIBALD B. LOVETT, Judge:

This is a suit in admiralty.

Claiming that the respondent furnished a cargo heavier than specified in the freight contract, the owner-operator

of the ship has sued for freight moneys in excess of the amount paid without prejudice. Issue is joined as to the weight of the cargo.

The contract was for a shipment of 750,000 board feet pine timbers "not exceeding 4 pounds per board foot at $70.00 per 1000 board feet on and/or under deck ship's option" from Jacksonville, Florida, to Alexandria, Egypt.

The cargo consisted chiefly of "water-seasoned" sawed pine timbers varying from 6x6 inches to 10x10 inches and from 16 to 40 feet in length. As distinguished from "air-dried" timbers they were seasoned by storage in water for periods running from several months to a year. These timbers were shipped to Jacksonville via railroad from various points in Florida, Alabama and Mississippi. They were loaded on flat cars at the points of origin and stacked with tiers of separation strips between them; and the butts, because of their random lengths, were spaced apart. The loading on these cars was on different dates, largely between November 15th and 21st, 1940. The cars moved approximately 400 miles by rail before reaching Jacksonville and were unloaded directly from the railroad cars on the dock into the ship. An average period of about two weeks elapsed from the loading on the railroad cars to the loading on the ship. The bills of lading issued by the railroad showed that the average weight of the timbers at or near the interior from where shipped was approximately 4¾ pounds per board foot. These facts coming to the knowledge of the ship, upon arrival in Jacksonville, and while the cars were still in the railroad yards, a controversy arose between the ship and a representative of the respondent concerning the true weight of the timbers at [fol. 28] that time. The ship suggested that sample cars be weighed. The respondent objected but agreed that all of the cars might be weighed. The timbers were not re-weighed at ship-side or elsewhere. The ship arrived at Jacksonville on November 26, began loading the next day, and sailed on December 4, 1940.

The questions are: first, did the timbers weigh more than 4 pounds per board foot when loaded on the ship, and, secondly, if they did, what are the consequences?

The libelant insists that as the timbers weighed more than 4 pounds per board foot when loaded on the railroad cars, in view of the weather and other conditions it should

be assumed they weighed as much when received into the ship, invoking the doctrine that a condition once established is presumed to continue for a reasonable length of time unless altered by an intervening force or circumstance. The respondent replies that the doctrine is inapplicable to an article like wet timbers, and contends the proof shows the timbers while being transported by railroad or in the yards would have dried out sufficiently to bring them within the weight stipulated in the contract; and says further libelant has failed to prove any damages even if it can be assumed the timbers were over-weight.

There is no direct evidence as to the weight of the shipment at ship-side or on board the vessel. Much testimony has been heard from many witnesses, who differ among themselves, as to the amount of moisture that would have evaporated between the time the timbers were weighed and arrived at ship-side, some giving expert opinions that three-fourths of a pound per board foot would be lost and others believing less.[1] The number of board feet of the timbers is known and not in dispute. The freight was paid [fol. 21] at the rate specified according to the board foot measurement.

The first question that arises, therefore, is where the burden of proof lies in a case of this kind. Having alleged in the libel that the weight of the timbers exceeded the maximum stipulated in the contract, holding the affirmative of that issue, it would seem that the onus at the beginning of the trial was on the libelant. If neither party had offered evidence the libelant would have been compelled to submit to an adverse judgment on the pleadings.[2] But it was shown that the weight exceeded the stipulated maximum when the timbers were loaded on the railroad cars. Is this sufficient to create a presumption that the weight was excessive when the timbers were loaded on the ship,

[1] It may be assumed that if parties to a contract express the freight rate with a guaranteed maximum weight per freight unit, or with a guaranteed minimum weight per cubic content, the shipper must pay for the excess weight in the one case or deficiency in the other, if the ship loses cargo space in either case. North & South Shipping Co. v. Cargo of Pine Boards, 1926, A. M. C. 839; Barber Steamship Lines v. Sloan & Co., 274 Fed. 365.

thus shifting the burden of proof?[3] I think not. The rule that a state once shown is presumed to continue is not without qualification and is not to be rigidly applied under all circumstances. Where likelihood of change is inherent in the thing itself, i. e., lumber or timbers, green or wet, exposed to the sun and air, whereby it dries and moisture evaporates, the inference of continuance does not arise. The more volatile the situation the less reliable is the presumption of the continuous state.[4] Blocks of ice and blocks of granite weighing the same when the sun shines on them hot do not last equally as long.

The libelant has failed to establish by a preponderance of the evidence that the shipment was over-weight when received on the ship.

[fol. 22] It must be admitted that the weight on board ship and not the weight on board the railroad cars, if they differ, should control the rights of the parties here.[5] Libelant had ample opportunity to weigh the timbers at Jacksonville before they reached ship-side. They were on cars in the railroad yards there. It would have been a simple matter, accompanied with little expense, to weigh them car by car (there were 52) on the railroad track scales. The respondent was willing for this to be done, though its representative objected to weighing sample cars only, saying they would not be representative. There was sufficient time before sailing after the ship arrived for this to be done. The ship declined. "In the absence of any custom

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[3] See 31 C. J. S., Evidence, Sec. 104; 20 Am. Jur., Evidence, Sec. 135.

[3] The burden of proof is here used in the secondary sense to designate an obligation to meet with evidence a prima facie case created against a party, sometimes called "burden of evidence." Mobley v. Lyon, 134 Ga. 125, 128-29.

[4] Jensen v. Logan City (Utah), 57 Pac. (2d) 708, 718; C. C. & St. L. Ry. Co. v. Starks (Ind.), 106 N. E. 646, 651; Cage v. Ansler (Tex.), 217 S. W. 1094; Hawkins v. Byrn (Tenn.) 261 S. W. 980; Bludworth v. Bray (Fla.), 52 So. 957; Lehigh Etc. Co. v. Trotter (N. J. Eq.), 9 Atl. 694; Wigmore on Evidence (3d Ed.), Vol. 2, Sec. 437; 55 C. J., Sales, Sec. 387; 22 Am. & Eng. Enc. L., p. 1239.

[5] Christie v. Davis Coal & Coke Co., 95 Fed. 837 (1), 838-39.

to govern the matter, the person who wants to ascertain the quantity must incur the trouble and expense of weighing."[6] Or the ship's draft marks could have been used before and after loading as a scale for determining the weight at least with some approximation. If so used, the result has not been shown.

The suggestion is made that the Carriage of Goods by Sea Act[7] forecloses respondent from disputing the weights shown by the ocean bill of lading. While such lading is prima facie evidence of the receipt of the goods as described, including the weight, the trouble here is I do not know that they recited any weights. The copies of the bills of lading were offered in evidence by the libelant without formal proof that they were true copies. The respondent objected to their being received because in the copies it held, furnished by the ship's agent, no weights appeared. The original bills of lading were not produced. Being order bills presumably they were surrendered to the ship at the port of discharge. There is some indications in the evidence that the weight was inserted in kilos and not in [fol. 23] pounds, for the purpose of calculating Suez Canal tolls, but when or by whom the weights may have been written and whether before or after the bills were turned over to the shipper, I do not know. Respondent's representative at Jacksonville could not remember, but the fact that the copies furnished him by the ship's agent contained no weights gives some support to the view that they must have been written into the ladings during the course of the voyage and were not in the originals when respondent received them and turned them over to the bank along with the other documents necessary for the collection of the price of the timbers sold. The copies of the bills of lading offered in evidence were finally admitted in evidence with the weights deleted by agreement of the parties.

Respondent also urges that even if a breach of warranty as to the weight of the timbers can be assumed libelant cannot recover, as there was no proof that any cargo was shut out or that any freights were lost, inasmuch as this

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[6] Per Willes, J., in Couldthurst v. Sweet, L. R. 1 C. P. 649; Scrutton on Charter Parties (14th Ed.), p. 419, note (p).

[7] 46 U. S. C., Sec. 1303 (4), (3b).

action is not for "dead freight" but is only for additional moneys in excess of the amount paid.

In view of my conclusions that over-weight has not been established by a preponderance of the evidence it seems unnecessary to pass on this last question.[8]

The libel will be dismissed.

This 5th day of December 1942:

(Signed) Archibald B. Lovett, United States Judge.

[fol. 24] In United States District Court

Findings of Fact—Filed April 20, 1943

1. Libelant, owner of the Panamanian S/S Kotor and respondent entered into a contract dated November 13, 1940, which, as corrected for a typographical error by stipulation of the parties, provided for a shipment of 750,000 board feet pine timbers "not exceeding 4 pounds per board foot at $70. per 1000 board feet on and/or under deck ship's option" from Jacksonville, Florida, to Alexandria, Egypt.

2. The cargo consisted chiefly of "water-seasoned" sawed pine timbers varying from 6x6 inches to 10x10 inches and from 16 to 40 feet in length. As distinguished from "air-dried" timbers they were seasoned by storage in water for periods running from several months to a year. These timbers were shipped to Jacksonville via railroad from various points in Florida, Alabama and Mississippi. They were loaded on flat cars at the points of origin and stacked with tiers of separation strips between them; and the butts, because of their random lengths, were spaced apart. The loading on these cars was on different dates, largely between November 15th and 21st, 1940. The cars moved approximately 400 miles by rail before reaching Jacksonville and were unloaded directly from the railroad

[8] See, however, Excelsior Coal Co. v. Gildersleeve, 160 Fed. 47; Barnet v. Luthur, 2 Fed. Cases, No. 1025; Herbst v. The Asiatic Prince, 97 Fed. 343; Munson v. Straits of Dover S. S. Co., 102 Fed. 926; In re Cal. Nav. & Imp. Co., 110 Fed. 670, 677; North & South Shipping Co. and Barber Steamship Lines cases, cited supra in f. n. 1.

cars on the dock into the ship. An average period of about two weeks elapsed from the loading on the railroad cars and the loading on the ship.

3. The bills of lading issued by the railroads showed that the average weight of the timbers at or near the interior from where shipped was approximately 4$\frac{3}{4}$ pounds per board foot. These weights were ascertained by the railroads for the purpose of assessing freight charges. 570,000 feet of the timbers involved were loaded on freight [fol. 25] cars at the point where they were removed from the pond and were moved a distance of forty-four miles to the point at which they were weighed. This timber was weighed on the day following the removal from the pond. 50,029 feet of the timber was similarly moved a distance of sixty miles from the point where it had been stored in water to the point where it was weighed. After the timbers were removed from the pond, until they were loaded on the ship, they were exposed to conditions which would tend to cause their moisture content to evaporate with a consequent loss of weight.

4. Libelant's agent in Jacksonville acquired knowledge of the railroad loading weights when the cars arrived at Jacksonville, while the 52 cars which comprised respondent's shipment were still in the railroad yards. A controversy arose between the libelant's agent and a representative of the respondent concerning the true weight of the timbers at that time. The libelant's agent suggested that sample cars be weighed. The respondent's representative objected to weighing sample cars only, on the ground that they would not be representative, but he was willing that all of the cars be weighed. The libelant's agent declined on the ground that it would cause too much delay in loading the ship.

5. The ship arrived at Jacksonville on November 26, 1940, began loading the next day, and sailed on December 4, 1940. There was sufficient time after arrival of the timbers at Jacksonville and before loading, for the cars containing the timbers to be weighed on the railroad track scales, which would have been a simple matter accompanied with little expense. The timbers were not reweighed at ship-side or elsewhere.

6. The respondent shipped the full contract quantity of 750,000 board feet, plus an additional quantity under a [fol. 26] second booking, the whole consisting of 811,710 board feet, which were loaded on the vessel. The respondent paid the freight at the rate specified according to the board foot measurement, and the libelant accepted payment thereof without prejudice to its contention that the timbers exceeded the weight specified in the contract.

Conclusions of Law

1. The weight of the respondent's shipment on board ship and not the weight on the railroad cars at other times and places, should control the rights of the parties.

2. The burden of proof that the respondent's shipment exceeded 4 pounds per board foot when loaded on the S. S. Kotor at Jacksonville rested upon the libelant.

3. Evidence that the weight of the timbers exceeded the stipulated maximum when they were loaded on the railroad cars does not create a presumption that the weight was excessive when the timbers were loaded on the ship, and does not shift the burden of proof which remained with the libelant.

4. The rule that a state once shown is presumed to continue is not without qualification and is not to be rigidly applied under all circumstances.

5. Where likelihood of change is inherent in the thing itself, i. e., lumber or timbers, green or wet, exposed to the sun and air, whereby it dries and moisture evaporates, the inference of continuance of weight does not arise. The more volatile the situation the less reliable is the presumption of continuous state.

6. Under the facts and circumstances disclosed by the evidence there is no presumption that the weight of re- [fol. 27] spondent's timber when loaded on the ship was in excess of the maximum specified in the contract, viz., 4 pounds per board foot.

7. The rights of the parties should not be governed by assumptions of the weight of respondent's timbers upon loading on board the vessel, particularly in view of the libelant's failure to obtain the best evidence by adopting

the reasonable procedure of determining the actual weight of the timbers by means of railroad scales or the approximate weight by means of ascertaining the ship's drafts and immersion scale during loading.

8. In the absence of proof that the ocean bills of lading, when issued by the libelant, recited the weights of the timbers, the Carriage of Goods by Sea Act does not foreclose the respondent from disputing the libelant's assertions concerning the weights.

9. The libelant has failed to establish by a preponderance of the evidence that the respondent's shipment exceeded the maximum weight specified in the contract.

10. The libel should be dismissed with costs.

Augusta, Georgia, April 20, 1943.

Archibald B. Lovett, United States District Judge.

Copy received and no objections as to form.

Cumming, Harper & Nixon.

[fol. 28] IN UNITED STATES DISTRICT COURT

In Admiralty No. 4

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S/S Kotor, Libelant,

against

GEORGIA HARDWOOD LUMBER COMPANY, Respondent

FINAL DECREE—April 20, 1943

The above cause having on the 24th day of June, 1942, been duly heard upon the pleadings and proofs, having been submitted by the advocates of the respective parties, and due deliberation having been had, and the Court having on the 5th day of December, 1942, filed its decision and opinion in writing directing that the libel herein be dismissed, and the Court having filed its findings of fact and conclusions of law pursuant to Supreme Court Rule 46½, and respondent's costs having been duly taxed in the sum of $111.90, it is now, on motion of Hull, Barrett, Willingham & Towill, proctors for the respondent,

Ordered, adjudged and decreed that the libel of Compania de Navegacion Transmar, S. A., herein be and the same hereby is dismissed; and it is further

Ordered, adjudged and decreed that the respondent, Georgia Hardwood Lumber Company, have, receive and recover of and from Compania de Navegacion Transmar, S. A., libelant, the sum of $111.90, its costs as taxed, with interest from the date of this decree until paid, and it is further

[fol. 29] Ordered, adjudged and decreed that unless this decree be satisfied, or proceedings thereon stayed by an appeal within ten days after service of a copy of this decree with notice of entry on the libelant or its proctors, the respondent have execution against the libelant and its stipulators for costs, their goods, chattels and lands, forthwith to satisfy this decree.

Archibald B. Lovett, United States District Judge.

[fol. 30] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 12, 1943

Suits:

Please Take Notice, that the Libelant, Compania De Navegacion Transmar, S. A., in the above entitled cause hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit to be held in the United States Court House, City of Atlanta, Georgia, from the final decree of this Court entered herein on the 20th day of April, 1943, and from each and every part of the said decree.

Dated, New York, July 6, 1943.

Yours, etc., Cummings, Harper & Nixon; Dow & Symmers, Proctors for Libelant.

910-915 Marion Building, Augusta, Georgia.

To: Hull, Barrett, Willingham & Towill, Esqs., Proctors for Respondent, Augusta, Georgia.

Carpenter & Stevenson, Esqs., Respondent's New York Correspondents, 70 Pine Street, New York City.

[fol. 31] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL

To the Honorable the Judges of the United States Court of Appeals for the Fifth Circuit:

The petition of Compania de Navegacion Transmar, S. A., Libelant, respectfully shows as follows:

1. That on or about the 10th day of May, 1941, the libelant filed its libel in the District Court of the United States, for the Augusta Division of the Southern District of Georgia, against Georgia Hardwood Lumber Company, in a cause of contract, civil and maritime, to recover $9,304.00 for alleged damages to the libelant by reason of which respondent's shipment of cargo exceeded its contract maximum weight as will more fully appear by reference to the libel; that on or about the 13th day of June, 1941, respondent, Georgia Hardwood Lumber Company, filed together with a stipulation for costs its answer to the libel.

2. On June 24th, 1942, this cause came on for trial and argument before Honorable Archibald B. Lovett, in the United States Court House, Augusta, Georgia, and at the close of the trial, the Court rendered its opinion, findings of fact and conclusions of law dismissing libelant's libel and complaint, and thereafter on April 20, 1943, a final decree was made and entered in this case whereby it was ordered, adjudged and decreed that the libel be dismissed, and that respondent recover its costs taxed in the sum of $111.90.

3. Libelant is advised and believes that a final decree, opinion, the findings of fact and conclusions of law rendered are erroneous, and that the opinion, findings of fact and conclusions of law did not adjudge and the final decree did not decree that libelant recover from respondent the sum of $9,304.00, together with interest and costs.

[fol. 32] Your Petitioner therefore prays that it may be allowed to appeal from the final decree to the next term of the Circuit Court of Appeals for the Fifth Circuit, and that a transcript of the record of the proceedings and papers upon which the decree was made, duly authenticated, may be sent accordingly to the Circuit Court of Appeals and that the usual citation may issue in order that the decree

may be fully reviewed and may be reversed by the Circuit Court of Appeals insofar as it orders and decrees the several matters alleged as error in the assignment of errors filed herewith.

(Signed) Dow & Symmers, (Dow & Symmers) Proctors for Libelant, 70 Pine Street, New York, N. Y.

(Signed) Cumming, Harper & Nixon, (Cumming, Harper & Nixon) Proctors for Libelant, 910-915 Marion Building, Augusta, Georgia.

Duly sworn to by Wilbur E. Dow, Jr. Jurat omitted in printing.

It is Ordered that the appeal herein be allowed as prayed for.

(Signed) Archibald B. Lovett, District Judge.

Dated: August 13, 1943.

[fol. 33] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed July 21, 1943

The libelant, Compania De Navegacion Transmar, S. A., hereby assigns error in the proceedings, decrees, orders and decisions of the District Court in the above entitled action as follows:

1. The District Court erred in finding that an average period of about two weeks elapsed from the loading on the railroad cars to the loading on the ship.

[fol. 34] 2. The District Court erred in finding that after the timbers were removed from the pond, until they were loaded on the ship, they were exposed to conditions which would tend to cause their moisture content to evaporate with a consequent loss of weight.

3. The District Court erred in failing to find that the timbers were substances of such a nature that they would resist and retain their moisture content though effected by conditions which would tend to cause their moisture content to evaporate with a consequent loss of weight.

4. The District Court erred in finding that there was sufficient time after arrival of the timbers at Jacksonville

and before loading, for the cars containing the timbers to be weighed on the railroad track scales, which would have been a simple matter accompanied with little expense.

5. The District Court erred in finding that the vessel was loaded with an additional quantity (of timber) under a second booking.

6. The District Court erred in finding that the respondent paid the freight at the rate specified according to the board foot measurement.

7. The District Court erred in failing to find that during the time from the weighing of the timbers on the railroad cars to the loading of them aboard ship, the atmospheric conditions through which the lumber moved had an average humidity of 90% saturation.

8. The District Court erred in failing to find that the respondent unreasonably refused to recheck the weight of sample cars at Jacksonville.

[fol. 35] 9. The District Court erred in failing to find that it was customary to weigh timbers as promptly as possible after shipment and this weight is presumed to continue through export.

10. The District Court erred in failing to find that the weight of "Longleaf Merchantable Sawn Pine Timbers, Rough" would not seem to be appreciably effected by the type of storage on the railroad cars and by the conditions within the area in which it passed in transit, and by the conditions existing up to the time it was loaded on the vessel.

11. The District Court erred in holding that the weight of the respondent's shipment on board ship and not the weight on the railroad cars at other times and places, should control the rights of the parties.

12. The District Court erred in holding that the burden of proof that the respondent's shipment exceeded 4 pounds per board foot when loaded on the S/S Kotor at Jacksonville rested upon the libelant.

13. The District Court erred in holding that the evidence that the weight of the timbers exceeded the stipulated maximum when they were loaded on the railroad cars does not

create a presumption that the weight was excessive when the timbers were loaded on the ship, and does not shift the burden of proof, if any, that remained with the libelant.

14. The District Court erred in holding that where likelihood of change is inherent in the thing itself, i. e., lumber or timbers, green or wet, exposed to the sun and air, whereby it dries and moisture evaporates, the inference of continuance of weight does not arise. The more volatile the situation the less reliable is the presumption of continuous state.

[fol. 36] 15. The District Court erred in holding that under the facts and circumstances disclosed by the evidence there is no presumption that the weight of respondent's timbers when loaded on the ship was in excess of the maximum specified in the contract, viz., 4 pounds per board foot.

16. The District Court erred in holding that rights of the parties should not be governed by assumptions of the weight of respondent's timbers upon loading on board the vessel particularly in view of the libelant's failure to obtain the best evidence by adopting the reasonable procedure of determining the actual weight of the timbers by means of railroad scales or the approximate weight by means of ascertaining the ship's drafts and immersion scale during loading.

17. The District Court erred in holding that in the absence of proof the ocean bills of lading, when issued by the libelant, recited the weights of the timbers, the Carriage of Goods by Sea Act does not foreclose the respondent from disputing the libelant's assertions concerning the weights.

18. The District Court erred in holding that the libelant has failed to establish by a preponderance of the evidence that the respondent's shipment exceeded the maximum weight specified in the contract.

19. The District Court erred in dismissing the libel with costs.

20. The District Court erred in failing to hold that the presumption of continuance of conditions shown to exist at the time the timbers were weighed on the railroad cars existed until the contrary was established.

21. The District Court erred in directing a decree for the respondent.

[fols. 57-104] 22. The District Court erred in failing to hold that libelant had established a prima facie case.

23. The District Court erred in failing to hold that the shipment had not met the burden of going forward with the evidence.

24. The District Court erred in failing to hold that respondent failed to meet its burden of proof.

Dated, July 15, 1943.

Cumming, Harper & Nixon, Esqs., Proctors for Libelant, 910-915 Marion Building, Augusta, Georgia.

Dow & Symmers, Esqs., by Joseph B. Cumming, Proctors for Libelant, 70 Pine Street, New York, N. Y.

Bond on appeal for $250.00, filed July 21, 1943, omitted in printing.

[fol. 108] In United States District Court

Stipulation, Settling the Record—Filed August 19, 1943

It Is Hereby Stipulated And Agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

Dated, August 19th, 1943.

Cumming, Harper & Nixon, Proctors for Libelant Appellant; Hull, Barrett, Willingham & Towill, Proctors for Respondent Appellee.

In United States District Court

Praecipe for Record—Filed August 14, 1943

To Scott A. Edwards, Clerk of the United States District Court for the Southern District of Georgia, Augusta Division:

We hereby request that the record on appeal in the above entitled case shall include the following:

1. Docket Entries.

2. Libel.

[fol. 109] 3. Respondent's Answer.

4. Libelant's demand for admission of facts, omitting copies of freight bills thereto attached; which is the same as Plaintiff's Exhibit No. 2.

5. Respondent's admission of facts.

6. Opinion.

7. Finding of facts and conclusions of law.

8. Final Decree.

9. Notice of Appeal.

10. Petition and Order allowing appeal.

11. Assignment of Errors.

12. Appeal bond.

13. Stenographic Record in the District Court, including:

(a) Testimony of libelant taken in Court of C. C. Royal.

(b) Testimony of respondent taken in Court of:

Mr. Parker,
F. L. Lancaster,
W. E. Dunham,
E. C. Boone,
P. N. Goffigan,
J. C. Wickliffe.

14. Plaintiff's Exhibit No. 1.

[fol. 110] 15. Stipulation as to Exhibits.

16. Stipulation settling Record.

17. Clerk's Certificate.

Cumming, Harper & Nixon, Dow & Symmers, Proctors for Libelant; Hull, Barrett, Willingham & Towill, Proctors for Respondent, by Carpenter & Stevenson, Associate Proctors.

[fol. 111] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 112] In the District Court of the United States for the Southern District of Georgia, Augusta Division

In Admiralty No. 4

Compania De Navegacion Transmar, S. A., Owner of the S/S Kotor, Libelant,

vs.

Georgia Hardwood Lumber Company, Respondent.

Order Allowing Appeal—Filed August 30, 1943

It having come to the attention of the Court that the notice of appeal in the above stated case filed with the Clerk on July 12, 1943, after service of a copy thereof had been made on opposing proctors, failed to have any allowance thereof entered thereon by the Judge of this Court, and it had been assumed by the leading proctors for libelant—now appellant—that the Clerk of this Court would present the said notice to the Judge of this Court for an allowance of the appeal to be entered thereon by the Judge, which is the procedure followed in the Second Circuit where proctors reside and principally practice, and that it was by reason of their reliance upon the Clerk of this District following the same procedure as the Second Circuit that there is not in the record any allowance of the appeal prior to the order allowing the appeal as prayed for in a petition therefor filed by appellant on August 12, 1943, which, however, was subsequent to the expiration of the ninety day period following the date of the final decree; and the Judge of this Court having learned during the said ninety day period of the inten-
[fol. 113] tion of appellant to appeal from the final decree and had not indicated any intention to disallow the same, and undoubtedly would have allowed the appeal if and when so requested, though he had been of the opinion that under Rule 12 (last par.) and Rule 10 (1) of the United States Circuit Court of Appeals for the Fifth Circuit formal allowance was no longer necessary,

Now, therefore, in order that the record may show said allowance of the appeal prior to the expiration of said ninety day period and thus supply any omission that may have been caused by the said assumption of the leading proctors for the appellant so that substantial justice may be done,

It is Ordered, that the said appeal be and the same is hereby allowed nunc pro tunc as of July 12, 1943, and it is further Ordered that this Order be filed and made a part of the record in the above stated case and that a copy thereof accompanied by a certificate of the Clerk of this Court be transmitted to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, to become a part of the record of this case already of file herein.

This August 30th, 1943.

Archibald B. Lovett, United States District Judge, Southern District of Georgia.

[fol. 114] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 114a] United States Circuit Court of Appeals for the Fifth Circuit, District Court of the United States for the Southern District of Georgia, Augusta Division

No. 10,796

In Admiralty

Compania De Navegacion Transmar, S. A., Owner of the SS. Kotor, Libelant,

against

Georgia Hardwood Lumber Company, Respondent

Citation of Case on Appeal

The President of the United States, to Georgia Hardwood Lumber Company:

You are hereby cited to be and appear in the United States Circuit of Appeals for the Fifth Circuit, to be held in the City of New Orleans, Louisiana, within thirty days from the date of this Citation pursuant to an appeal allowed and filed in the office of the Clerk of the District Court of the United States for the Southern District of Georgia, Augusta Division, in which Compania de Navegacion Transmar, S. A., is the Appellant and Georgia Hardwood Lumber Company is the Appellee, to show cause, if any there may be, why the decree complained of by said appeal should

not be reversed and a decree entered in favor of the Appellant as sought by its appeal.

Witness the Honorable Archibald B. Lovett, Judge of the United — District Court for the Southern District of Georgia.

This 16 day of August, 1943.

(Signed) Archibald B. Lovett, United States Judge.

Service of the foregoing citation and receipt of a copy thereof acknowledged, this 17 day of August, 1943.

(Signed) Hull, Barrett, Willingham & Towill,

(Signed) Carpenter & Stevenson, Proctors for the Appellee. Entered on Minute Book "I" at Page 37. (Signed) Dorothy H. Murray, Deputy Clerk, 8-18-43.

U. S. District Court, Augusta Division. Filed in Clerk's Office 11:30 A. M., Aug. 17, 1943, Scott A. Edwards, Clerk, (Signed) by Orlena T. Weaver, Deputy Clerk, D. E.

(Original Filed September 10, 1943)

[fol. 114b] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 115] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:—

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 1st, 1944

No. 10796

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S/S "KOTOR",

versus

GEORGIA HARDWOOD LUMBER COMPANY

On this day this cause was called, and, after argument by Wilbur E. Dow, Jr., Esq., for appellant, and John Tilney Carpenter, Esq., for appellee, was submitted to the Court.

[fol. 116] OPINION OF THE COURT—Filed April 5, 1944

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10796

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S/S "Kotor", Appellant,

versus

GEORGIA HARDWOOD LUMBER COMPANY, Appellee

Appeal from the District Court of the United States for the Southern District of Georgia

(April 5, 1944)

Before Hutcheson, Holmes, and Lee, Circuit Judges.

HUTCHESON, Circuit Judge:

The suit by libel *in personam* was for $9,304.00 freight money on pine timbers weighing 531,656 pounds or 265.82 tons, at $35.00 per ton, from Jacksonville, Florida, to Alex-

andria, Egypt. The claim was that libellant and respondent had agreed that libellant should carry "750,000 board feet of pine timbers, not exceeding four pounds per board foot, at [fol. 117] $70.00 per 1000 feet", or $35.00 per short ton; that instead of 4 pounds, the timbers libellant had carried had averaged 4.75 pounds per board foot; the shipment as a whole had weighed 531,656 pounds in excess of the guaranteed weights; and respondent had not paid libellant for the carriage of this excess weight to its damage in the sum sued for. The respondent admitted: that the contract was as pleaded; that the respondent did load the timbers on the vessel; and that libellant did transport them as alleged. It denied, though, that respondent had loaded, and libellant had carried, any excess weight; and put libellant on its proof.

On the trial it was established: that the contract was made as pleaded; that the timbers were purchased and shipped from different points throughout Florida, Alabama, and Mississippi, 75 percent coming from Century and Gulf Hammock, Florida, and Brewton, Alabama; and that most of them had been water stored, i. e., had been in mill ponds from two months to a year. This fact of water storage and the possible or probable subsequent drying out of the timbers was permitted to dominate and give direction to the case.[1]

[1] There was testimony showing that: hoisted aboard flat cars, the Century and Brewton lots were carried from 40 to 60 miles by rail to Pensacola, the Gulf Hammock to Dunnellon, and there weighed the day after they were loaded, some 24 to 48 hours after leaving the water, they were carried thence to Jacksonville, a distance of 340 miles from Pensacola and 100 miles from Dunnellon. The cars arrived at various railroad yards in Jacksonville between Nov. 19th and Dec. 1st, in an average of 4.3 days after they were weighed. Of the 38 cars of the Century lot, 25 arrived between Nov. 19th and Nov. 23rd, 11 on the 27th, and one on Dec. 1st; two of the three Brewton cars arrived on the 27th and the third on the 1st. The Gulf Hammock car arrived on Nov. 26th. The Kotor docked on Nov. 26th, and began loading on the morning of the 27th. The cars were moved from the yards to the wharf and the timbers were loaded directly onto the ship. Approximately 10 cars were loaded a day and all of them discharged by Dec. 1st. The maximum

[fol. 118] The district judge, of the opinion that the evidence of the amount of drying and loss of weight that would occur was sufficient to overcome the effect of libellant's proof by the offer of the railroad weights, thought that libellant had failed to sustain its burden of showing that the shipment was overweight when received on the ship. He, therefore, decided against libellant and dismissed the libel.

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period of sixteen and an average period of 10 days elapsed from the time the first car was weighed until the last car was loaded on the vessel. When weighed by certified railway weighing masters, the timbers averaged 4.75 pounds to the board foot. The weights were entered on the railroad bills of lading which showed in addition that the car load lots ranged on an average from 4.3 to 5.23 pounds per board foot. When after remaining in the yards from one to five days the timbers were loaded aboard the ship, the bills of lading were delivered to libellant. The weather throughout the section was extremely humid, particularly at Jacksonville, where it rained every day but two from the time the first car arrived until the last car was loaded aboard the ship. When some of the cars first arrived and libellant's agent learned that the weight of the timber was running heavy, he advised respondent, its agent came down, and controversy arose. Libellant's agent suggested that sample cars be weighed, respondent's agent objected to weighing sample cars and insisted that all the cars be weighed. Libellant's agent objected on the ground that it would cause too much delay in loading the ship. There was testimony that a test weight could be obtained by weighing sample cars and libellant's expert testified that he had never known of the practice of weighing timbers at a port after they had been weighed at an interior point where it was customary to weigh them. It was testified that when water stored timbers are taken out of the water they weigh a little more than green timber. Seasoned timber weighs less than green or water seasoned. The average weight of green timbers of the size of those in this case is 4½ pounds. It would take at least a year to sun dry green timbers to bring them down to the 3.6 pounds per board foot of such timbers; water stored timbers taken out of the water would be considered dried in four to six months. The extent or amount of loss of moisture content of green or water seasoned timber depends on conditions and varies from time to time.

Libellant is here insisting that the judgment be reversed. Respondent, insisting that the judgment is supported by the evidence and may not be reversed, moves to dismiss the appeal because not timely applied for.[2]

[fol. 119] The point as to our jurisdiction is quite a serious one. Because, as expressly provided in Rule 81(a)(1), The Federal Rules of Civil Procedure do not apply in admiralty,

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When water stored timber is taken out of water, its moisture content has a tendency to equalize with the atmospheric conditions. Heat has very little to do with its equalizing. Wind is much better than sunshine. Circulation is the principal drying quality. There was testimony of witnesses that in their opinion the timber would lose weight between the time it was weighed and the time it reached Jacksonville, ten, twelve to fifteen percent, according to which estimates, if accepted, the timber would have had an average weight of 31 pounds over the guaranteed weight.

[2] This is the record: On April 20, 1943, a final decree dismissing the libel was entered, and appellant did not within the 90 days from that date fixed by statute formally apply for and obtain the allowance of an appeal. Instead, on July 6, it issued, served on, and obtained the acceptance of respondent's proctors of a notice of appeal, which notice on July 12th it filed in the office of the Clerk of the District Court, at which time proctors for libellant consulted the district judge on the amount of the appeal bond. This, fixed at $250.00, was executed in New York on July 16, and with assignment of errors, was mailed to and filed with the clerk on July 21st. On Aug. 6th, libellant prepared and swore to a formal petition for appeal, filed it on Aug. 12th, and on August 13th, obtained an order of allowance. On Aug. 30, the district judge signed and filed an order that the libellant be allowed an appeal nunc pro tunc as of July 12, 1943, the order reciting that it had been assumed by the proctors for libellant, now appellant, that the clerk of the court would present the notice to the judge for allowance of appeal, and that because of this reliance there is not in the record any allowance of this appeal prior to the order of Aug. 13. The order also recited that the district judge learned during the 90 day period of the intention of appellant to appeal from the decree and had not indicated any

appellate jurisdiction in admiralty depends upon substantial reliance on 28 USCA, Sec. 230. This provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

In *Alaska Packers vs. Pilsbury*, 301 U. S. 174, decided before the adoption of the new Federal Rules, the United States Supreme Court held that a rule, of the circuit court of appeals, which substituted notice for an application for and allowance of an appeal was invalid, and that an appeal from a final judgment not applied for within the ninety days was invalid. In *The Fannie "D"*, 112 F. (2) 347, the Fifth Circuit, and in *Blaske vs. Dick*, 126 F. (2) 96, the Seventh Circuit held that an appeal from an interlocutory decree in admiralty must be applied for and allowed within the fifteen days fixed by statute, and that the ninety days' period fixed in the Civil Rules was not applicable.

[fol. 120] Appellee relies upon the holding of these decisions that the statutory requirement that an application for appeal must be made within the time fixed is not a technicality which can be waived. He relies, too, on decisions like *Ross vs. White*, 32 F. (2) 750; *Camden v. City of Cincinnati*, 241 Fed. 846; and others decided on appeals other than in admiralty, before the new rules went into effect, that the mere filing with the clerk of an application for or notice of appeal not presented to the judge cannot be construed as a properly filed application. As to the *nunc pro tunc* order of the district judge, appellee points out that if it was made at a time when the court, for want of an application timely filed, had lost jurisdiction, the judge could not, by calling his order a *nunc pro tunc* one,

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intention to disallow the same, and undoubtedly would have allowed it if, and when so requested, though he was of the opinion that under rule 10(1) (Appeals in Civil Action) and rule 12 (Appeals in Admiralty), last paragraph (Appeals in Admiralty are otherwise covered by the general rules of the court) of the United States Circuit Court of Appeals for the Fifth Circuit, formal allowance was no longer necessary.

confer on himself a jurisdiction which had already been lost.

Appellant concedes that if the notice of appeal it filed and the action taken by the judge in fixing the bond within the ninety days cannot be treated as an application for appeal, the application later filed and the orders of the judge would be unavailing. It insists though that what it did must be regarded as an application for appeal, and it points to the authorities holding that if an application is timely filed, the order granting the appeal may be made after the time has expired. Of the "Aalska" case, it argues: that there was no order there allowing the appeal, the rule having undertaken to do away with the necessity for an order by providing that an appeal could be taken by simply giving notice; that all that was held in that case was that that rule was not valid and that the statute requiring application and allowance must be complied with. As to the *Fannie "D"* and the *Blasky* cases, *supra*, it points out that there the decision was not that a notice under the new rules if timely made could not be taken as an application for an appeal. It was that an interlocutory appeal in [fol. 121] admiralty required to be taken within fifteen days could not be taken later.

Appellant, invoking cases like *Brandies v. Cochrane*, 106 U. S. 262; *U. S. v. Beaman*, 61 Fed. (2) 493; *The Ruth*, 20 Fed. (2) 314; *U. S. vs. Todar*, 41 Fed. (2) 146; *Donaldson v. Baltimore Acc. Corp.*, 38 Fed. (2) 215; where it is held that if the application is timely filed, the allowance may be made later, puts its final allowance on cases like *R. F. C. vs. Prudence Group*, 311 U. S. 579; *Crump v. Hill*, 104 Fed. (2) 36; *Baxter v. Savings Bank*, 92 Fed. (2) 404; *Wilson vs. Alliance Life*, 102 Fed. (2) 365; which hold in effect that it would be "a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice" to deprive a litigant of his right to appeal merely because, though it plainly appeared that he was intending to, and thought he was doing what was necessary to, appeal, he took his steps informally instead of formally.

We agree with appellant. It is quite plan that it was endeavoring to appeal. That the judge and everyone else concerned thought it was effectively appealing, the record leaves in no doubt, and but for the language of the opinion in the *Alaska* case, which, though not directly in point, is

disturbing, we should not hesitate to hold: that what appellant did amounted to a timely application to appeal; that it was granted; that the appeal was perfected; and that our jurisdiction became established. It is quite clear that it does not at all advance the cause or the appearance of justice to deny to what appellant did the legal effect it was designed to achieve. We think that *R. F. C. vs. Prudence Group* and the other cases cited above warrant our taking jurisdiction and denying the motion to dismiss.

On the merits, we think it clear that appellant is right. The evidence of the rail weights was sufficient unless overthrown to entitle libellant to judgment. In the face of the positive rail weights obtained and furnished by the respondent, it was not sufficient for respondent to offer opinion testimony of the vague and unsatisfactory nature of that offered. This is especially true not only because this evidence taken as a whole lacks convincingness but because it shows not that there was not, but that there was, some excess weight. This does not mean that the opinion testimony that the timbers would dry and had to some extent dried must be wholly rejected. It does mean, though, that taking the record as a whole, the judge's view of it, that the effect of the offer of the railroad weights establishing excess weight had been entirely overthrown, is not a sound one.

[fol. 122]

The motion to dismiss the appeal is denied, the judgment is reversed, and the cause is remanded for further and not inconsistent proceedings.

[fol. 123] JUDGMENT

Extract from the Minutes of April 5th, 1944

No. 10796

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S/S "Kotor",

versus

GEORGIA HARDWOOD LUMBER COMPANY

This cause came on to be heard on the motion filed by appellee on February 26, 1944, to dismiss the appeal herein, and on the transcript of the record from the District Court of the United States for the Southern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the said motion to dismiss the appeal be, and the same is hereby, denied; and that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;

It is further ordered, adjudged and decreed that the appellee, Georgia Hardwood Lumber Company, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 124] MOTION AND ORDER STAYING MANDATE—Filed April 21, 1944

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10796

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S. S. Kotor, Libelant-Appellant,

against

GEORGIA HARDWOOD LUMBER COMPANY, Respondent-Appellee

SIRS:

Please Take Notice that the respondent-appellee herein will on the 24th day of April, 1944 present the attached

motion and application to the United States Circuit Court of Appeals for the Fifth Circuit at the courtrooms thereof in the Post-Office Building, City of New Orleans, State of Louisiana, at 10:30 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard.

Dated, New York, N. Y.
April 19, 1944.

Yours, etc., Hull, Barrett, Willingham & Towill, Proctors for Respondent-Appellee, Office & P. O. Address Southern Finance Building, Augusta, Georgia, and Carpenter & Stevenson, Associate Proctors for Respondent-Appellee, Office & P. O. Address 70 Pine Street, Borough of Manhattan, New York City.

To: Dow & Symmers, Esqs. Proctors for Libelant-Appellant, 70 Pine Street, New York, N. Y.

[fol. 125] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10796

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S.S. Kotor, Libelant-Appellant,

against

GEORGIA HARDWOOD LUMBER COMPANY, Respondent, Appellee.

Now comes Georgia Hardwood Lumber Company, respondent-appellee in the above entitled action, and moves and respectfully applies to this Court for a stay of the mandate of this Court pending the filing by respondent-appellee in the Supreme Court of the United States of a petition for a writ of certiorari to this Court from the decision of this Court herein entered April 5th, 1944, and pending determination of said petition and the certification from the Clerk of the Supreme Court of the United States, and for such other and further relief as the justice of the cause may require.

Respondent-appellee intends to petition the Supreme Court of the United States for a writ of certiorari to this

Court in order to obtain a review by the Supreme Court of the opinion and judgment of this Court dated April 5, 1944, as stated in the accompanying affidavit of John Tilney Carpenter sworn to the 19th day of April, 1944.

Hull, Barrett, Willingham & Towill, Proctors for Respondent-Appellee, Office & P. O. Address Southern Finance Building, Augusta, Georgia; and Carpenter & Stevenson, Associate Proctors for Respondent-Appellee, Office & P. O. Address 70 Pine Street, New York City.

[fol. 126] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10796

COMPANÍA DE NAVEGACION TRANSMAR, S. A., Owner of the S.S. Kotor, Libelant-Appellant,

against

GEORGIA HARDWOOD LUMBER COMPANY, Respondent, Appellee.

STATE OF NEW YORK,
County of New York, ss.:

John Tilney Carpenter, being duly sworn, deposes and says:

I am a member of the firm of Carpenter & Stevenson, of counsel for Georgia Hardwood Lumber Company, respondent-appellee in the above action, and conducted argument of the appeal in this Court on behalf of said respondent-appellee.

The respondent-appellee intends to apply to the Supreme Court of the United States for a writ of certiorari to this Court in order to obtain a review by the Supreme Court of the opinion and judgment of this Court dated April 5, 1944. Due to distance and the length of time necessary to exchange communications with the Clerk of this Court, I did not, in spite of the fact that I immediately sent to the Clerk of this Court payment for a copy of the opinion as soon as I heard from him that an opinion had been rendered, receive a copy of this Court's opinion until April

12th. I immediately communicated with my client and its counsel in Augusta, Georgia for instructions, but because of distance and length of time necessary for communication, it was not until yesterday that I received instructions to apply for a writ of certiorari. Under the rules of this Court [fol. 127] the mandate of this Court is to issue on April 26th, and there is not sufficient time to prepare a petition and supporting brief before that date.

The petition will be filed promptly and the proceedings carried out as expeditiously as possible.

Accordingly it is respectfully prayed that the mandate of this Court be stayed pending filing of the petition for such a writ of certiorari and determination thereof, and certification of the Clerk of the Supreme Court of the United States.

John Tilney Carpenter.

Sworn to before me this 19th day of April, 1944.
Edith F. Walsh, Notary Public, Queens Co. Clk's No. 2972 N. Y. Co. Clk's No. 748; Reg. No. 432-W-6
Commission expires March 30, 1946. (Seal.)

[fol. 128] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10796

COMPANIA DE NAVEGACION TRANSMAR, S. A., Owner of the S.S. Kotor, Appellant,

versus

GEORGIA HARDWOOD LUMBER COMPANY, Appellee.

On consideration of the application of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate

of the clerk of the Supreme Court that certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 21st day of April, 1944.

(Signed) J. C. Hutcheson, Jr., United States Circuit Judge.

[fol. 129] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 130] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10796

COMPAGNIA DE NAVEGACION TRANSMAR, S. A., Owner of the S.S. Kotor, Appellant,

versus

GEORGIA HARDWOOD LUMBER COMPANY, Appellee.

On consideration of the application of the Appellee in the above numbered and entitled cause for a further stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a further period of thirty days; from May 21st 1944, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from May 21st, 1944, there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been

given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from May 21st, 1944, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at Houston, Texas, this 19th day of May, 1944.

(Signed) J. C. Hutcheson, Jr., United States Circuit Judge.

[fol. 131] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, limited to the first and second questions presented by the petition for the writ and case transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 132] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTED RECORD—Filed October 28, 1944

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the following matter may be omitted from the printed record herein:

1. Libelant's demand for admission of facts, printed at pages 12-17 of the record on appeal in the Circuit Court of Appeals for the Fifth Circuit.

2. Respondent's admission of facts printed at pages 17, 18 of said record.

3. Bill of costs printed at page 29 of said record.

4. Proceedings and testimony on trial before United States District Court, printed at pages 39-101 of said record.

5. Plaintiff's Exhibit 1, printed at pages 101-103 of said record.

6. Stipulation as to exhibits printed at pages 103-107 of said record.

It is further stipulated and agreed that in printing the record for the use of this Court, the following corrections to the record on appeal in the United States Circuit Court of Appeals for the Fifth Circuit be made:

[fol. 133] 1. *Index.* The words "Final Decree entered 4/23/43" shall be changed to "Final Decree entered 4/20/43."

2. *Docket Entries* (page 2 of Circuit Court of Appeals' record) shall contain the following additional matter: "Aug. 30, 1943. Order dated August 30, 1943 allowing appeal nunc pro tunc as of July 12, 1943."

It is further stipulated and agreed that the record for the use of this Court shall contain in full the citation filed in the Office of the Clerk of the United States Circuit Court of Appeals, referred to at page 112 of the record on appeal in said court.

Dated, October 27, 1944.

John Tilney Carpenter, Counsel for Petitioner;
Wilbur E. Dow, Jr., Counsel for Respondent.

Endorsed on Cover: File No. 48633, U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 180. Georgia Hardwood Lumber Company, Petitioner, vs. Compania de Navegacion Transmar, S. A., Owner of SS. Kotor. Petition for writ of certiorari and exhibit thereto. Filed June 20, 1944. Term No. 180 O. T. 1944.